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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

58549

FILE: B-182754 DATE: February 18, 1975

MATTER OF: Chrysler Corporation

DIGEST:

1. Statutory amendment which enables GSA to purchase additional automobile systems and equipment over and above basic vehicle price limitation, and which states additional equipment prices shall not be considered in determining if basic vehicle cost exceeds statutory price limitation, does not mean agency cannot examine price structure of bid to determine whether significantly high prices for additional equipment indicate attempt to circumvent basic price limitation, since it is unreasonable to conclude that Congress, in authorizing purchase of additional equipment, intended at same time to allow circumvention of statutory price limitation for basic vehicle.

2. Where IFB requires bids to be in accord with statute containing price limitation for basic vehicles and authorizing additional equipment purchases, and GSA finds price structure of bids indicates significantly high additional equipment prices, giving rise to inference that part of basic vehicle cost has been included in additional equipment price in attempt to circumvent statutory price limitation, reasonable basis is shown to reject bids as nonresponsive owing to defective bid price structure, even though stated reason for rejection--"material unbalancing" of bids--is imprecise.

Chrysler Corporation's protest involves the question of whether the General Services Administration (GSA) acted properly in rejecting Chrysler's bids under several solicitations for automobiles because the bids were "materially unbalanced so as to constitute a circumvention of the statutory price limitation for passenger motor vehicles." Though we do not agree that the issue here involves unbalanced bidding, we nevertheless find no basis for objection to GSA's rejection of the bids, and the protest is accordingly denied.

The solicitations in question (Nos. FPML-P3-72902-A-10-15-74, FPML-D4-71833-A-10-24-74, FPML-P5-76160-N-10-10-74 and FPML-P7-77354-N-11-25-74) invited bids on a number of separate items

covering various quantities of passenger motor vehicles meeting certain described specifications. The solicitations included the following terms:

> "1. SUBMISSION OF OFFERS:
>
> (a) Offers shall be submitted * * * in accordance with Public Law 91-423 * * *.
>
> (b) By statutory limitation, the price of the standard passenger vehicles completely equipped for ordinary operation shall not exceed $2,100 for Sedans and $2,400 for Station Wagons, exclusive of (1) transportation costs and (2) the 'additional systems and equipment' found appropriate for this procurement pursuant to Public Law 91-423 and FPMR Subpart 101.25.304, 304-1 and 304-2 dated October 30, 1971. Both (i) the amount included in each item bid price for transportation; and (ii) the price for the specified 'additional systems and equipment' shall be stated separately in the schedule of items. (Offeror's failure to state both (i) and (ii) shall render its offer nonresponsive.)"

Public Law 91-423, September 26, 1970, entitled an act "To allow the purchase of additional systems and equipment for passenger motor vehicles over and above the statutory price limitation," amended paragraph (1) of subsection (c) of section 5 of the Act of July 16, 1914, as amended (codified at 31 U.S.C. § 638a). As amended, 31 U.S.C. § 638a states in pertinent part:

> "Unless specifically authorized by the appropriation concerned or other law, no appropriation shall be expended to purchase or hire passenger motor vehicles for any branch of the Government * * * .
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> * * * * *
>
> "Unless otherwise specifically provided, no appropriation available for any department shall be expended--

> "(1) to purchase any passenger motor vehicle (exclusive of buses and ambulances), at a cost, completely equipped for operation, and including the value of any vehicle exchanged, in excess of the maximum price therefor, if any, established pursuant to law by a Government agency and in no event more than such amount as may be specified in an appropriation or other Act, which shall be in addition to the amount required for transportation. A passenger motor vehicle shall be deemed completely equipped for operation if it includes the systems and equipment which the Administrator of General Services finds are customarily incorporated into a standard passenger motor vehicle completely equipped for ordinary operation. Notwithstanding any other provisions of law, additional systems or equipment may be purchased whenever the Administrator finds it appropriate. The price of such additional systems or equipment shall not be considered in determining whether the cost of a passenger motor vehicle is within any maximum price otherwise established by law;"

Most of the items in the first of the above-listed solicitations were subject to the statutory price limitation. As to these items, Chrysler was the only bidder. GSA evaluated Chrysler's bids on these items and determined that, although overall prices appeared to be reasonable, the portions of the prices stated in the bid as relating to additional systems and equipment appeared to be substantially higher than publicly suggested retail prices. At GSA's request, Chrysler reviewed and confirmed its prices. GSA then rejected Chrysler's bid as to these items on the basis that the bid was materially unbalanced so as to constitute a circumvention of the statutory price limitation for passenger motor vehicles. It is reported that the same results occurred as to Chrysler's bids on the three succeeding solicitations.

Chrysler first contends that GSA is misinterpreting and misapplying 31 U.S.C. § 638a. The protester points out that the statutory price limitation applies to the cost of the passenger motor vehicles only; moreover, the statute specifically states that the price of additional systems and equipment shall not be considered in determining whether the cost of a passenger motor vehicle is within any maximum price established by law. Chrysler

thus contends that GSA is improperly performing a legislative function by taking into account in bid evaluation that portion of the overall price which is allocated to additional systems and equipment, and that the agency is, in effect, imposing its own limit on the costs of additional systems and equipment.

We believe that to accept Chrysler's view would mean, as GSA points out, that the statutory price limit established by Congress for passenger motor vehicles could easily be avoided. We note that the above-quoted statutory provision which enables GSA to make purchases of additional systems and equipment also makes clear that passenger vehicle purchases shall not be in excess of the maximum price established pursuant to law. In this light, we think it would be unreasonable to conclude that the Congress, in enacting Public Law 91-423 to enable GSA to purchase additional systems and equipment over and above the statutory limit, at the same time intended the anomalous and self-defeating consequence of allowing bidders to circumvent the statutory price limitation itself by transferring part of the basic vehicle cost to the portion of the bid price allocated to additional systems and equipment. Therefore, we agree with GSA that it is not only proper, but essential, that the contracting officer examine the bid prices and portions thereof allocated to additional systems and equipment to determine whether the statutory price limitation is being circumvented.

Chrysler next contends that its bids are not unbalanced, since an unbalanced bid is one which is based on nominal prices for some work and enhanced prices for other work, citing Frank Stamato & Co. v. City of New Brunswick, 90 A. 2d 34 (1952). Chrysler points out that its bids do not fit this description, since it is bidding a single unit price per item. The portion of the bid prices allocated to additional systems and equipment is separately stated, as required by the terms of the IFB, but it is not a separate bid price on a different item. Further, Chrysler contends that even if its bids are unbalanced, this in itself does not mean they must be rejected, citing 49 Comp. Gen. 330, id. 335 (1969) and other decisions of our Office.

As for the question of unbalanced bids, in a recent decision (Matter of Mobilease Corp., B-181050, September 27, 1974, 54 Comp. Gen. _____), our Office stated:

"In Matter of Oswald Brothers Enterprises Incorporated, B-180676, May 9, 1974, our Office

> recognized the two-fold aspects of unbalancing. See, also, 49 Comp. Gen. 787, 792 (1970). The first is a mathematical evaluation of the bid to determine whether it is unbalanced. As noted in Armaniaco v. Borough of Cresskill, 163 A. 2d 379 (1960), and Frank Stamato & Co. v. City of New Brunswick, 90 A. 2d 34, 36 (1952), the mathematical aspects of identifying an unbalanced bid focus on whether each bid item carries its share of the cost of the work and the contractor's profit or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect involves an assessment of the cost impact of a bid found to be mathematically unbalanced. Unless there is reasonable doubt that by making award to a party submitting a mathematically unbalanced bid, award will not result in the lowest ultimate cost to the Government, the bid should not be considered materially unbalanced. See B-180676, supra B-172789, July 19, 1971; 49 Comp. Gen., supra; Matter of Global Graphics, Incorporated, B-180996, August 2, 1974, 54 Comp. Gen. _____."

In the present case, we believe it is imprecise to characterize the issue, as the protester and GSA have done, as a question of whether the bids were unbalanced. Rather, the question here is whether the Chrysler bids contained a price structure which was so defective that GSA was obliged to reasonably regard it as constituting a failure of the bids to comply in all material respects with the terms of the IFB's. For a case involving a similar allegation that a bid's defective price structure failed to conform to the IFB, while not involving a question of unbalanced bidding, see 53 Comp. Gen. 225, 227 (1973).

The IFB terms in the present case included a requirement that bids be in accordance with Public Law 91-423. In this light, if it were found that a bid's price structure constituted an attempt to circumvent the statutory price limitation, then the bid would be properly for rejection as nonresponsive. Under these circumstances, there would be no need to consider whether the bid is mathematically or materially unbalanced.

As noted supra, GSA found that the additional systems and equipment prices were substantially higher than publicly suggested

retail prices. GSA's administrative report indicates that Chrysler's bids charged approximately 49 percent over suggested retail prices for additional systems and equipment. Chrysler has not taken issue with these statements. In fact, in its letter to GSA dated October 30, 1974, the protester indicated that GSA's analysis of the bid on the first solicitation was basically correct insofar as it pertained to additional systems and equipment. This letter contains an analysis of typical additional equipment on approximately 59 sedans, showing that the bid price for the equipment totals $1,169.00, compared to a dealer net cost of $471.34 and a suggested retail price of $592.65.

Under the circumstances, we see no basis to question GSA's determination that the high portion of the bid prices allocated to additional systems and equipment, giving rise to inference that part of the basic vehicle cost has been transferred into the additional systems and equipment price, must reasonably be regarded as constituting an attempt to circumvent the statutory price limitation. As the bids thus failed to conform in all material respects to the terms of the IFB's, they were properly rejected.

In a letter to our Office dated January 20, 1975, Chrysler raised several objections concerning an additional GSA vehicle solicitation (No. FPML-P2-77777-A-11-15-74). Chrysler had previously written to GSA raising questions about amendments made to several provisions of this solicitation. GSA did not respond to this letter but instead referred Chrysler to our Office, stating that the issue raised was already under consideration here.

Chrysler's first objection is to the following provision (the portions specifically objected to are underlined):

> "Offerors are further cautioned that bids which are materially unbalanced so as to constitute a circumvention of the statutory limitation for basic vehicles shall be rejected. For purposes of this solicitation, an unbalanced offer is one which, although not exceeding the price limitation for basic vehicles, is based on prices for the additional systems and equipment or transportation significantly in excess of the prices available in the commercial market place."

Chrysler contends that the reference to "materially unbalanced" is so vague that a bidder cannot know how to avoid submitting such

a bid; specifically Chrysler queries whether quoting additional equipment at "dealer net" prices would result in a "materially unbalanced" bid. Similarly, the protester argues that "commercial market place" is excessively vague, in that there is no explanation of what this term means; also, that the attempt to establish such a limitation is improper, because each procurement in effect establishes its own "market place."

As for the reference to "materially unbalanced," for the reasons already indicated we believe the use of this term is imprecise in the present context. Therefore, we are recommending that GSA give consideration to redrafting this portion of the clause to achieve greater clarity.

In addition, regardless of the fact that the clause in its present form may be imprecise, we do not believe a sufficient basis exists to conclude that the clause fails to adequately inform bidders of the risk involved in submitting a defectively priced bid--i.e. that a bid whose defective price structure constitutes an attempt to circumvent the statutory price limitation is properly for rejection.

As for the expression "prices available in the commercial market place," we are of the view that the clause must contain some reasonably definite guideline as to what may constitute a defective bid price structure. In this regard, we note that to state an absolute guideline is not feasible, because the contracting agency would not necessarily look only to the bid price structure itself to determine if it is defective. Factors such as prior cost experience, Government estimates, and the price structure of competitors' bids may also be pertinent. Cf. 48 Comp. Gen. 34, 38 (1968). In this light, we believe the question of what represents a reasonable degree of definiteness is largely for resolution by the exercise of sound judgment by the procuring agency. On the present record, we cannot say that the clause as it stands is insufficiently definite.

Chrysler's second point is that an amendment to the "Method of Award" clause in solicitation No. FPML-P2-77777-A-11-15-74 which deleted certain statements makes the clause unclear. The clause states as follows (deleted portions are indicated in brackets):

> "METHOD OF AWARD: Award will be made item-by-item on the basis of the lowest delivered cost to the

Government evaluated to the ultimate destination shown for the item in the schedule of items. Transportation costs for FOB Destination and FAS Vessel, Port of Shipment items will be based on the most economical rates available to the Government as stated in Section 1-19.203-3 of the Federal Procurement Regulations. [Awards will be made for each item comprising (1) the standard passenger vehicles (e.g., Items 8, 9, 10, 11, 13, 15 & 16 as appropriate, of Federal Standard 122N dated November 15, 1973 together with (2) the specified 'additional systems and equipment'; provided the prices for both (1) and (2) are considered reasonable.] Where optional equipment is requested on an 'if available, additional cost basis', the Government desires vehicles be equipped with these options. However, the cost of this optional equipment will not be considered in the evaluation of offers. [Award will be made to the lowest offeror on the basic vehicle(s).]"

In this regard, Chrysler requests that GSA advise all bidders whether this clause would permit the agency to make an award for an item or for items at the base vehicle price or prices by deleting requirements for additional systems and equipment.

As we read the protester's January 20, 1975, letter, it does not appear that Chrysler has specific objections to the changes in the Method of Award clause as such, except for the fact that it finds the clause to be unclear and confusing. Chrysler's submission in this regard appears to be in the nature of a request for clarification from the contracting agency. GSA has not formally expressed its views to our Office as to the meaning of the Method of Award clause as presently constituted, or as to whether it is the intent of the clause to permit awards in the manner suggested by Chrysler. Possibly the question raised by Chrysler could be resolved simply by explanation or further amendment. In this regard, we note that paragraph 3 of Standard Form 33A (March 1969 ed.), Solicitation Instructions and Conditions, provides that offerors may obtain an explanation regarding the meaning or interpretation of solicitation terms. Under the circumstances, we believe it is for GSA to attempt to resolve with Chrysler the question it has raised concerning the Method of Award clause.

Deputy Comptroller General
of the United States